Supreme Court, U.S.
FILED
SEP 13 1994
OFFICE OF THE CLERK

No. 94-113

In The

Supreme Court of the United States

October Term, 1994

JOHN R. IVIMEY, SR.,

Petitioner,

VS.

THE VARIABLE ANNUITY LIFE INSURANCE COMPANY and F. WILLIAM SCOTT,

Respondents.

On Petition For Writ of Certiorari
To the United States Court Of Appeals
For The Second Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION

Austin J. McGuigan, Esq.
Joseph B. Burns, Esq.
Counsel of Record
Hoberman, McGuigan, Friedman,
McNamara & Ruberto, P.C.
One State Street
Hartford, CT 06103
(203) 549-1000

Counsel for Respondents

William A. Wilson, the Variable
Annuity Life Insurance Company
2929 Allen Parkway
Houston, TX 77019
(713) 831-5491

Of Counsel

QUESTIONS PRESENTED FOR REVIEW

Whether the court below is correct in affirming the district court's dismissal for lack of subject matter jurisdiction over petitioner's claim for breach of employment contract on the ground that, as a matter of law, the petitioner's claim did not satisfy the $50,000 amount required for diversity jurisdiction pursuant to 28 U.S.C. §1332(a)(1); and whether the court below is correct in affirming the district court's grant of summary judgment for respondents on petitioner's claim under the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §42-110a, et seq., on the ground that it is barred by the statute of limitations.

DISCLOSURE OF CORPORATE PARENT

American General Corporation is the parent corporation of respondent, Variable Annuity Life Insurance Company.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . . . i

DISCLOSURE OF CORPORATE PARENT . . . ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT 2

REASONS FOR DENYING THE WRIT 9

I. Petitioner Presents no Issues in Conflict Among the Circuit Courts, nor any Special or Important Issues 9

II. Petitioner may not Raise New Issues for the First Time on Petition for Writ of Certiorari 11

III. The Decision of the Court Below was Correct 13

CONCLUSION 19

TABLE OF AUTHORITIES

A.F.A. Tours Inc. v. Whitchurch, 937 F.2d 82, 88 (1991) 13

Beckenstein v. Potter & Carrier, Inc., 191 Conn. 150, 163, 464 A.2d 18 (1983) 17

Connell v. Colwell, 214 Conn. 242, 250, 571 A.2d 116 (1990) 17

Graver Tank & Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949) 10

Magnum Import Co. v. Coty, 262 U.S. 159, 163 (1923) 10

McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936) . . . 13

Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985) 12

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74, (1955) . . . 9

Sonzinsky v. United States, 300 U.S. 506, 514 (1937) 12

St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938) 14

Taylor v. Freeland & Kronz, 503 U.S. ____, 112 S. Ct. 1644, 1649 (1992) . 12

United States v. Johnston, 268 U.S. 220, 227 (1925) 10

Wetmore v. Rymer, 169 U.S. 115, 121-22 (1898) 14

Youakim v. Miller, 425 U.S. 231, 234 (1976) (per curiam) 12

28 U.S.C. §1254(1) 2

28 U.S.C. §1332(a) 4

28 U.S.C. §1332(a)(1) i

Conn. Gen. Stat. §42-110a, et seq. i, 5

Conn. Gen. Stat. §42-110g(f) 16

Conn. Gen. Stat. §52-595 . . . . 15, 17

Fed. R. Civ. P. 12(h)(3) 14

S. Ct. R. 10.1 9

No. 94-113

In The

Supreme Court of the United States

October Term, 1994

JOHN R. IVIMEY, SR.,

Petitioner,

VS.

THE VARIABLE ANNUITY LIFE INSURANCE COMPANY and F. WILLIAM SCOTT,

Respondents.

On Petition For Writ of Certiorari
To the United States Court Of Appeals
For The Second Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court below is unreported, and is reproduced in Petitioner's Appendix at A-1 to A-5.

JURISDICTION

The judgment of the court of appeals was issued as mandate on May 6, 1994. The petition for writ of certiorari was filed on July 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

This case arises out of the employment relationship between the petitioner and the respondent, The Variable Annuity Life Insurance Company (Variable). The petitioner was hired by Variable in July, 1983 as a sales agent to market tax exempt annuity contracts to Connecticut public school employees. The parties' employment agreement was reduced to a written contract, executed by the plaintiff on July 1, 1983 (the Contract).

The Contract was terminable by either party upon the giving of thirty (30) days notice.

Sales of the tax-exempt annuities were restricted in certain Connecticut school districts to annuity contracts issued by annuity companies approved by the school district. Therefore, in order for the petitioner to sell annuity contracts within any such school district, Variable had to be an approved company.

Shortly after the plaintiff's employment with Variable, a dispute arose between the petitioner and the respondent, F. William Scott, Variable's northeast regional sales manager (hereafter Scott), as to whose responsibility it was to obtain approval for Variable to sell within a given school district. The petitioner maintained that it was

Variable's responsibility to do so. Variable maintained that this in fact was one of the petitioner's job duties as a Variable sales agent. The petitioner fared poorly as a Variable sales agent, and was ultimately terminated effective March 1985.

In July 1989, the petitioner commenced the instant action against Variable and Scott, claiming breaches of constructive and implied conditions of the Contract, and seeking damages by way of lost earnings. Jurisdiction was alleged to be based on diversity of the parties under 28 U.S.C. §1332(a). The defendants filed an answer denying subject matter jurisdiction and asserting affirmative defenses of failure to state a claim upon which relief may be granted and statute of limitations.

After discovery, the petitioner amended his complaint to add, inter alia, a claim for breach of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §42-110a, et seq. (CUTPA). The respondents thereafter moved for summary judgment. The district court granted summary judgment in favor of respondent Scott as to all claims, and granted summary judgment in favor of Variable on the petitioner's CUTPA claim.

The case then proceeded to trial on June 9 and 10, 1993 on petitioner's claims for breach of constructive condition of the contract and the implied covenant of good faith and fair dealing. At the close of the petitioner's case, the district court, sua sponte, raised the issue of the court's subject matter jurisdiction over the petitioner's claim, as it was

apparent, to a legal certainty, that petitioner had failed to produce evidence to allow the jury to find damages in excess of $50,000. After allowing the petitioner an opportunity to identify any evidence which would substantiate a claim of damages within the jurisdictional amount, the court dismissed the case. The petitioner thereafter filed a motion for reconsideration. In ruling on the petitioner's motion the district court confirmed dismissal of the case for lack of subject matter jurisdiction.

The petitioner thereafter appealed the decision of the district court to the Second Circuit court of appeals, taking issue with the district court's: dismissal for lack of subject matter jurisdiction; limitation of the petitioner's claims to breach of constructive condition of the

contract and implied covenant of good faith and fair dealing; granting of summary judgment in favor of the respondents on his claim under CUTPA; and reliance upon interrogatory responses in considering the motions for summary judgment. The court below affirmed the district court's rulings, holding that, to a legal certainty, the petitioner had failed to introduce evidence to support a claim for damages with the jurisdictional amount, (Pet. App. A-4), and that petitioner's claims under CUTPA were barred by the applicable statute of limitations. (Pet. App. A-5). All other issues were deemed to be without merit. Id.

Petitioner now seeks this Court to grant a writ of certiorari, claiming that both the district court and the circuit

court misconstrued his evidence. He now claims, for the first time, that his employment with Variable was never terminated, and that he should therefore be entitled to continued commissions under the Contract, damages which would satisfy the jurisdictional requirements. Petitioner's second issue raised in his petition is that his CUTPA claim should not be barred by the statute of limitations because: the respondents did not raise the statute of limitations as a special defense; and that his cause of action was fraudulently concealed by the respondents until it arose in discovery.

REASONS FOR DENYING THE WRIT

I. Petitioner Presents no Issues in Conflict Among the Circuit Courts, nor any Special or Important Issues

1. The petitioner fails to present any issues involving conflict within the circuit courts, nor does he offer any special or important reasons for granting a writ of certiorari. This Court simply should not waste any more of its valuable time in considering this petition.

A review on writ of certiorari is not a matter of right, but of judicial discretion, which will be granted only when there are special and important reasons therefore. S. Ct. R. 10.1. "'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74,

(1955). No such issues are presented in this case.

The jurisdiction of this Court by way of certiorari is not conferred merely to give the defeated party another hearing. Magnum Import Co. v. Coty, 262 U.S. 159, 163 (1923). "[A] court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." Graver Tank & Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949). Certiorari is not granted "to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). The issues presented here are factually intensive, and are governed by long established legal

principles which do not raise any unique or important issues requiring this Court's determination. As this petitioner merely seeks to have this Court re-evaluate the evidence and issues already duly considered and disposed of by the district and circuit courts, his petition must be denied.

II. Petitioner may not Raise New Issues for the First Time on Petition for Writ of Certiorari

1. The Petitioner raises for the first time in his petition to this Court the issue as to whether or not his employment with Variable, and thus the Contract, was ever terminated. (Pet. p. 9). Petitioner is apparently trying to claim that because the Contract with Variable was never terminated, he is entitled to continue to reap the benefits therefrom. (Pet. pp. 15-16).

Petitioner failed to raise this isuue as error before the circuit court. That the Supreme Court will not discuss a petitioner's contentions which he failed to assign as error below is established, black letter law. Sonzinsky v. United States, 300 U.S. 506, 514 (1937). "'Ordinarily, [the Supreme Court] does not decide questions not raised or resolved in the lower court[s].' Youakim v. Miller, 425 U.S. 231, 234 (1976) (per curiam). These principles help to maintain the integrity of the process of certiorari. Cf. Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985)." Taylor v. Freeland & Kronz, 503 U.S. _____, 112 S. Ct. 1644, 1649 (1992).

Because the petitioner has raised the issue of the termination of the Contract for the first time in his

petition, it should not now be considered by this Court as a reason to grant certiorari.

III. The Decision of the Court Below was Correct

1. The decision of the circuit court in affirming the district court's dismissal of the case for lack of subject matter jurisdiction was a correct one, based on established federal law.

It was the petitioner's burden to prove that the amount in controversy met the jurisdictional requirements. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936). The petitioner was allowed every opportunity to establish that his damages were in excess of $50,000; see A.F.A. Tours Inc. v. Whitchurch, 937 F.2d 82, 88 (1991); but he was unable to do so. The district court

properly raised the issue of subject matter jurisdiction sua sponte. Fed. R. Civ. P. 12(h)(3). Having the advantage of receiving all of petitioner's evidence introduced at trial, the district court then determined that, to a legal certainty, the petitioner had failed to introduce sufficient evidence to allow a jury to find that his claim satisfied the jurisdictional requirements. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938). There is no merit to petitioner's claim that such an issue of jurisdiction must be submitted to the jury. Wetmore v. Rymer, 169 U.S. 115, 121-22 (1898).

Given that the circuit court's decision is firmly grounded upon established legal principles, there is no reason for this Court to conduct yet

another review of the facts of this case, simply because petitioner is dissatisfied with the outcome.

2. The petitioner also claims that he should have been allowed to proceed on his CUTPA claim for two reasons: the defense of statute of limitations was not properly raised by the respondents; and, even if the statute of limitations was properly before the court, the respondents fraudulently concealed his cause of action under CUTPA, tolling the statute of limitations pursuant to Conn. Gen. Stat. §52-595. The petitioner is wrong on both counts.

First, the respondents did in fact plead the statute of limitations as a special defense in their answer to petitioner's amended complaint. (R. 46). When the district court granted summary

judgment in favor of respondents on the CUTPA claim, it held that CUTPA was inapplicable to claims arising out of the employment context, and did not address the statute of limitations issue. (Ruling on Motion for Summary Judgment, July 2, 1992, R. 50, p. 3). Respondents raised the statute of limitations again in their brief to the circuit court, however, as an alternative basis on which to uphold the district court's ruling. The circuit court relied upon this alternative basis, holding that the CUTPA claim was barred by the statute of limitations, Conn. Gen. Stat. §42-110g(f). (Pet. App. A-4).

Second, the petitioner failed to properly raise the claim of fraudulent concealment, and may not at this late date be allowed to rely upon it. Connecticut law provides that:

> If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence.

Conn. Gen Stat. §52-595. The claim of fraudulent concealment must be affirmatively plead by a plaintiff seeking to invoke it. Beckenstein v. Potter & Carrier, Inc., 191 Conn. 150, 163, 464 A.2d 18 (1983). The plaintiff must then prove that the defendant was aware of the facts necessary to establish the cause of action in question, and that he intentionally concealed the cause of action from the plaintiff for purposes of obtaining delay. Connell v. Colwell, 214 Conn. 242, 250, 571 A.2d 116 (1990).

In the instant case, petitioner neither plead fraudulent concealment, nor

did he attempt to introduce, at any time, evidence of respondents' knowledge of any CUTPA claim, or their attempts to conceal the existence of such a claim from petitioner for purposes of delay. Therefore, petitioner cannot now rely on a claim of fraudulent concealment to breath life into an expired CUTPA claim.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Austin J. McGuigan, Esq.
Joseph B. Burns, Esq.
Counsel of Record
Hoberman, McGuigan,Friedman,
McNamara & Ruberto, P.C.
One State Street
Hartford, CT 06103
(203) 549-1000

Counsel for Respondents

William A. Wilson, the Variable
Annuity Life Insurance Company
2929 Allen Parkway
Houston, TX 77019
(713) 831-5491

Of Counsel

September 13, 1994